84-1878

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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AARON MAXWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether the Fourth Amendment rights of individuals who have permission to use and the right to exclude others from a residential structure which is not their home require clarification?

2. Whether this Court should reconcile conflicting opinions regarding the proper standard to be employed in determining the validity of a search warrant issued upon an affidavit which contains information obtained from an illegal search?

Parties

The caption does not mention the following parties in the proceedings below: Clifford Antone, Mikal Amuny and Royce Hebert. These three individuals were Maxwell's co-defendants. Their appeals were consolidated with his in the Court of Appeals. Antone, Amuny and Hebert are also expected to petition this Court for a Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AARON MAXWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 753 F.2d 1301 (5th Cir. 1985) and is set forth herein at App. 2a. The unreported opinion for the United States District Court for the Western District of Texas is set forth herein at App. 14a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 11, 1985 and petition for rehearing was denied on March 15, 1985. This petition is filed within 60 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory and Constitutional Provisions Involved

U.S. Const., Amend IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

A. Material Facts

The issues presented for review by this Court arise out of a warrantless search of a residence by state and federal law enforcement officials in Austin, Texas.

From October 29 until November 1, 1982, Agent Richard Braziel received reports from an anonymous informant to the effect that Allen Granger would travel to Austin, Texas, to obtain marijuana from Clifford Antone and Mikal Amuny. On the basis of this information, Braziel and other law enforcement officers engaged in surveillance of Antone and Amuny. During the course of their surveillance on November 2, 1982, officers saw Petitioner Aaron Maxwell leave a fast food restaurant to which Antone and Amuny had been followed. Maxwell drove away from the restaurant in a car which the confidential informant had identified as Allen Granger's.

Maxwell was followed to 1713 Sylvan Drive, a residential dwelling in Austin, Texas. Officers saw Maxwell drive into the garage attached to the house. One officer, Agent Braziel, left his vehicle, crept up to the house and eavesdropped upon the activities inside. He testified that he heard the trunk of the car being opened and the sound of objects being loaded into the trunk.

Maxwell returned Granger's car to the restaurant parking lot and reentered the premises. Thereafter, Granger left the restaurant and drove off. Granger was arrested within a few blocks of the restaurant. Maxwell, Amuny and Antone were arrested simultaneously in the restaurant parking lot.

Search warrants were obtained for Granger's car and the house at 1713 Sylvan Drive. The same affidavit subscribed by Agent Braziel was submitted for each warrant.

In his affidavit Braziel alleged that a confidential informant had said that Granger would travel to Austin to obtain marijuana from Clifford Antone and Mikal Amuny. Braziel's affidavit also contained the following statement regarding his entry into the premises at 1713 Sylvan Drive:

> The surveillance observed Aaron Maxwell, a black male, exit JoJo's restraunt [sic] and enter the blue and white 1977 Chevrolet bearing 1983 Tx license PCQ658 and drive it to 1713 Sylvan Drive, in Austin, Texas, a few blocks from the JoJo's restraunt [sic]. S/A Braziel observed the vehicle pull into the garage and the garage door then closed. S/A Braziel further heard a car trunk lid being opened. Further, S/A Braziel heard a noise like heavy objects being thrown in a trunk of a vehicle, after which the trunk lid slamed [sic]. The garage door opened and the blue and white Chevrolet bearing 1984 Tx license plate PCQ658, driven by Aaron Maxwell backed out of the garage (App. 22a).

In addition, Braziel alleged that a second unidentified informant had told him that Antone and Amuny had previously used a restaurant in the vicinity of I-35 and Oltorf—the same vicinity in which Antone, Amuny and Maxwell were arrested—to conduct narcotics business. The informant also claimed that "after narcotics transactions were completed . . . a black male would usually load the buyer's vehicle at a garage in a residence" and deliver the marijuana (App. 21a). Petitioner Aaron Maxwell is a black male.

B. The District Court's Decision

Maxwell moved to suppress the fruits of the searches authorized by the warrants. He argued that Braziel's surreptitious entry onto the premises at 1713 Sylvan Drive constituted a warrantless search of a dwelling. Since Braziel's affidavit contained information obtained from this warrantless search, Maxwell also argued that the searches conducted pursuant to the warrants had to be suppressed as the fruits of the warrantless search.

Initially the Government conceded that Maxwell had a reasonable expectation of privacy in 1713 Sylvan Drive when he was on the premises. Later, the Government withdrew this concession and Aaron Maxwell and Royce Hebert, who had leased the house, submitted affidavits to the court.

In his affidavit Maxwell stated that Hebert had given him keys to the house and an electronic garage door opener; that Maxwell used 1713 Sylvan Drive as his own place; that he kept some clothes and books there and slept there two or three nights a week; that Maxwell had orders from Hebert to keep the premises secure from intruders; and that Maxwell kept the house locked at all times. In his affidavit Hebert stated that he was the owner/occupant of 1713 Sylvan Drive; that he had allowed Maxwell to stay on the premises and had given him a key to the premises and the garage door opener for his use; and that he and Maxwell had an understanding that Maxwell was not to allow anyone to use the house at 1713 Sylvan Drive.

The district court also heard testimony that a spiral notebook with Maxwell's fingerprints on it was found at 1713 Sylvan Drive; that a set of keys had been taken from Maxwell when he was arrested; and that clothes and a bed were found in the master bedroom and that it appeared as if someone were living in the house. In addition, a private investigator testified that he interviewed individuals who lived in the vicinity of 1713 Sylvan Drive and they reported that they had occasionally seen a black man at 1713 Sylvan Drive.

The district court held that Maxwell could not challenge either of the searches which occurred at 1713 Sylvan Drive because he had failed to prove residency there. The district court conceded that Maxwell's fingerprints had been found at 1713 Sylvan Drive but the court ultimately concluded that a "post search investigation of 1713 Sylvan Drive found no indicia of residence for Aaron Maxwell" and that "[n]o keys, clothes or any other fact would show that he resided at that address." (App. 17a)

The district court maintained that Maxwell's affidavit[1] asserting a privacy interest in the premises at 1713 Sylvan Drive was not sufficient to establish standing. The court concluded that Maxwell's affidavit was insufficient proof of his residence at 1713 Sylvan Drive and, consequently, he lacked standing to challenge a search of the premises.

> This affidavit is not sufficient in the Court's view. The Court finds no other indicia indicating the defendant made 1713 Sylvan Drive his residence. This Court will not deny the admission of the affidavit as evidence, but will give as much weight as this Court's judgment and counsel may allow. *United States v. Matlock*, 415 U.S. 164. As noted in *United States v. Briones-Garza*, 680 F.2d 417, whether a person has a reasonable expectation of privacy turns on the facts of each case. The Court concludes that the facts are insufficient to support defendant's allegation of residence in this case. (App. 18a-19a)

The district court agreed that Agent Braziel conducted a warrantless search of a home when he crept onto the premises at 1713 Sylvan Drive and that the information Braziel obtained in the course of this illegal search should not have been included in the warrant affidavit. However, the district court concluded that sufficient probable cause

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[1] The district court did not even discuss Royce Hebert's affidavit.

existed "based upon the facts provided by the informant and the observance and surveillance of the arresting officers" (App. 19a) to justify the warrantless arrest of Aaron Maxwell.

C. The Decision in the Court of Appeals

In the Fifth Ciruit, Maxwell argued that the district court's decision on the standing issue was erroneous because the court had ruled in effect that a person must prove that he resides in a dwelling to establish a reasonable expectation of privacy in the premises. Maxwell also argued that the warrants were invalid because the information obtained by Braziel during his warrantless search of 1713 Sylvan Drive was a critical element in the warrant affidavit. Maxwell argued that the district court's ruling with regard to the validity of the warrants was erroneous because the court ignored the impact of the tainted information on the judicial official who issued the warrants. The district court never redacted the tainted information from the warrant and determined whether the remaining information set forth probable cause.

The Fifth Circuit noted that no clothes nor personal belongings of Maxwell's—except the blue spiral notebook bearing his fingerprint—were found inside the house at 1713 Sylvan Drive. Consequently, the Fifth Circuit held that "the district court's conclusion that Maxwell had no legitimate expectation of privacy in the house . . . was correct." (App. 12a) The Fifth Circuit also held that the "district court's redaction of the search warrant and the court's ruling on the admissibility of the evidence obtained in the search of [1713 Sylvan Drive] were correct." (App. 13a)

REASONS FOR GRANTING THE WRIT

I. The Fourth Amendment rights of individuals who have permission to use and the right to exclude others from a residential structure which is not their home require clarification.

There are many individuals who, like Aaron Maxwell, exercise many of the privileges of ownership with respect to certain residential premises, yet they do not have any legally recognized property interest in the premises nor can they be said to reside there. The right of privacy of such individuals is a thorny question upon which this Court's opinions shed little light. This case presents this Court with the opportunity to clarify a rather confused and confusing area of Fourth Amendment law.

In deciding the privacy rights of an individual who has the right to use and power to exclude others from a residential dwelling which is not his home or primary residence, a court must apply conflicting principles. On the one hand, it is well established that the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Fourth Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois,* 439 U.S. 128, 143 (1978). *Katz v. United States,* 389 U.S. 347 (1967). In ascertaining an individual's Fourth Amendment rights with respect to certain premises a court must inquire (a) whether the person by his conduct has exhibited an actual (subjective) expectation of privacy; and (b) whether the individual subjective expectation of privacy is one which society is prepared to recognize as reasonable. *Smith v. Maryland,* 442 U.S. 735, 740-741 (1979).

Use of property concepts in determining the presence or absence of the privacy interests protected by the Fourth Amendment, however, has not been abandoned altogether. In *Rakas*, this Court observed:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment either by by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.
>
> 439 U.S. at 143-144, n. 12

Moreover, among other facts to be considered in determining whether a person's Fourth Amendment rights have been violated are (a) whether the defendant has a possessory interest in the thing or place searched; (b) whether he has the right to exclude others from the premises; and (c) whether he is legitimately present on the premises.

This case clearly illustrates the difficulties which lower courts face in attempting to apply the general principles set forth in *Rakas, Rawlings v. Kentucky*, 448 U.S. 98 (1980), and *United States v. Salvucci*, 448 U.S. 83 (1980). Indeed, this case demonstrates that the general propositions set forth in *Rakas, Salvucci*, and *Rawlings* are completely inadequate standards for ascertaining the Fourth Amendment rights of individuals like Aaron Maxwell.

Maxwell did not have claim nor did he have a proprietary interest in the house at 1713 Sylvan Drive. He alleged only that Royce Hebert, the lessee of the premises, had given him permission to use the premises and the right and the mandate to exclude others. Maxwell did not state that the house at 1713 Sylvan Drive was his home. He only stated that he slept there a few nights a week and that he kept some p rsonal property and some clothing there.

Common law concepts of property are of little or no value in determining Maxwell's Fourth Amendment rights at 1713 Sylvan Drive. The common law recognized that an individual could by open, notorious and continuous possession establish

proprietary rights in a particular parcel of land. Maxwell's intermittent use of the premises at 1713 Sylvan Drive with the permission of the lessee clearly established no property rights under the doctrine of adverse possession.[2] R. Cunningham, *The Law of Property*, §11.7, p. 75 (1984). On the other hand, Maxwell did enjoy some control over the premises as well as the right to exclude others from the premises.

Moreover, society seems prepared to accept as reasonable Maxwell's expectation of privacy in a house which he had permission to use as his own. Neither the fact that the person may enjoy this right only for a brief period of time nor the fact that he may exercise it on an intermittent basis seems to deprive the person of an expectation of privacy.

In *United States v. Cassity*, 720 F.2d 451 (6th Cir. 1983), for example, the Sixth Circuit held that co-defendant Lenk had an expectation of privacy in a house which was the site of a laboratory where he manufactured illicit drugs. Although the Government maintained that Lenk could not challenge a search of a house at which he did not reside, the Court held that Lenk's status as a guest of the owner of the house gave him a legitimate expectation of privacy which the police were not privileged to infringe. And, in *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), the Fifth Circuit held that a married man who maintained his own home with his wife and children and who stayed at his parents' home only when he and his wife had domestic problems had a reasonable expectation of privacy in his parents' home.

In *United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983), the Eighth Circuit ruled that Quintero, an overnight guest in Perez's home, had a "reasonable expectation of privacy in the entire [Perez] home." The Ninth Circuit has also upheld the right of an overnight guest to challenge a

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[2] Nor would Maxwell qualify as a tenant of Royce Hebert under contemporary notions of property law. R. Cunningham, *The Law of Property*, §6.13, p. 269 (1984).

search of a house in which he had no proprietary interest. *United States v. Robertson,* 606 F.2d 853, n.1 (9th Cir. 1979).

Thus, Aaron Maxwell's situation is hardly unique. There are numerous individuals who may move into another person's house or apartment temporarily or who may use another individual's dwelling as their own house a few days during the week. Determining the privacy rights of such persons is a recurring problem which the lower courts require some guidance in confronting. There is no clear consensus on what an individual must prove to establish an expectation of privacy in a dwelling which he does not own and over which he may exercise dominion and control intermittently or fleetingly. For this reason, this Court should review the instant case.

II. This Court should reconcile conflicting opinions regarding the proper standard to be employed in determining the validity of a search warrant issued upon an affidavit which contains information obtained from an illegal search.

There is some controversy regarding the analysis which a court should utilize in determining the validity of a search warrant premised upon an affidavit which contains information obtained from an earlier illegal search. There is authority for the proposition that the warrant should be ruled invalid if it can be said that the tainted information was a critical element in the warrant affidavit. On the other hand, many courts confronted with search warrant affidavits containing information obtained from an illegal search have simply employed the analysis set out in *Franks v. Delaware,* 438 U.S. 154 (1978). These courts simply ignore the tainted information and examine the remainder of the affidavit to ascertain whether it sets forth probable cause for a search.

This Court's opinion in *United States v. Giordano,* 416 U.S. 505 (1974) seems to indicate that a court must do more than determine whether a search warrant application sup-

ports a finding of probable cause after information obtained from an illegal search or seizure is excised from the warrant. In *Giordano,* this Court suppressed evidence obtained from wiretaps because the person who authorized the application for a court order for the wiretaps lacked authority to do so. This Court also suppressed evidence obtained from two pen register extension orders and a wiretap extension order because they were derivatively tainted by the initial invalid interception. In a footnote, this Court observed "that the illegally monitored conversations should be considered a *critical element* in extending the pen register authority." (emphasis supplied) *United States v. Giordano, supra,* 416 U.S. at 534, n. 19.

Some have suggested that under *Giordano* a court must ascertain whether the information obtained from an earlier illegal search or seizure constituted a "critical" element in relation to the totality of the material presented to the judge or magistrate who issued the warrant. If the illegally obtained information constituted a critical element of the material submitted to the issuing judge or magistrate, all evidence seized pursuant to the warrant must be suppressed even if the warrant application with the illegally obtained information excised would have supported a finding of probable cause. W. LaFave, *Search and Seizure,* §11.4, vol. 3, p. 650 (1978); *Commonwealth v. Hall,* 336 Mass. 790, 323 N.E.2d 319 (1975). Cases decided by this Court subsequent to *Giordano* can also be construed as endorsing a critical element test.

For example, in *Segura v. United States,* ____ U.S. ____, 104 S.Ct. 3380 (1984), this Court considered whether drugs and other items not observed during the initial entry into the defendant's apartment and first discovered by agents the day after the entry, under an admittedly valid search warrant, should have been suppressed.[3] The affidavit submitted in

[3] After arresting Segura in the lobby of his apartment building, the agents entered his apartment and arrested his cohort, Luz Colon. After completing a "limited security" search of the

(footnote continued on the following page)

support of the application for the search warrant did not contain any information obtained as a result of the initial entry. Thus, this Court could have used the analysis from *Franks v. Delaware, supra,* to sustain the validity of the search conducted pursuant to the warrant. Instead, the Court, citing *Wong Sun v. United States,* 371 U.S. 471 (1963), focused upon whether the search warrant was a means sufficiently distinguishable to purge the evidence of any taint arising from the entry. ____ U.S. at ____, 104 S.Ct. at 3386.

This Court ultimately concluded that suppression of the fruits of the search conducted pursuant to a warrant was unnecessary because "the illegal entry into [defendant's] apartment did not contribute in any way to discovery of the evidence seized under the warrant." ____ U.S. at ____, 104 S.Ct. at 3391. Indeed, this Court noted that no information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. ____ U.S. at ____, 104 S.Ct. at 3391.

However, to the extent that this Court's opinion focuses upon the insignificance of the information obtained during the illegal entry, it is arguably an application of the critical element test. This Court's emphasis upon the insignificance of the tainted information in *Segura* suggests that this Court would have ruled the warrant invalid if the tainted material had influenced the decision to issue the search warrant, even if the warrant affidavit with the illegally obtained information excised would have supported a finding of probable cause.

In *United States v. Karo,* ____ U.S. at ____, 104 S.Ct. 3296 (1984), this Court considered as a collateral issue the validity of a search conducted pursuant to a warrant issued on the

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(footnote continued from the preceding page)
apartment, the agents left with Segura and Colon. However, two agents remained in the apartment until the next day when some of their colleagues returned with a search warrant for the apartment.

basis of an affidavit which contained information obtained from an illegal search. The *Karo* opinion is rather ambiguous. It contains an assertion that the search conducted pursuant to a warrant would pass constitutional muster "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause" as well as a citation to the opinion in *Franks v. Delaware.* ____ U.S. at ____, 104 S.Ct. at 3305. But, the opinion also contains language which requires a court to determine whether information obtained from an illegal search was a critical element in the affidavit. This Court noted that information from illegal monitoring by an electronic beeper which was included in a warrant affidavit "would invalidate the warrant if it proved to be critical to establishing probable cause for the issuance of the warrant." ____ U.S. at ____, 103 S.Ct. at 3305.

A review of the decisions from the Courts of Appeals also produces conflicting views of the proper analysis to be employed in reviewing a search warrant containing information from an illegal search. In the Sixth Circuit, it has been held that a warrant must be held invalid unless the information from an illegal search comprises a very minor portion of the affidavit. *United States v. Langley,* 466 F.2d 27 (6th Cir. 1972); *United States v. Nelson,* 459 F.2d 884 (6th Cir. 1972). On the other hand, the Second, Third, Fifth, Eighth and Ninth Circuits have held that a court must simply redact from the warrant affidavit information obtained from an illegal search and ascertain whether the remainder of the affidavit sets forth probable cause. *United States v. Sterling,* 369 F.2d 799, 802 (3rd Cir. 1966); *United States v. Tarant,* 460 F.2d 701, 703-704 (5th Cir. 1972); *United States v. Koonce,* 485 F.2d 374, 379 (8th Cir. 1973); *Howell v. Cupp,* 427 F.2d 36, 38 (9th Cir. 1970).

The standard to be employed by a court in determining the validity of a search warrant premised upon an affidavit which contains information from an earlier illegal search is a matter of great public importance. More is at issue here than the need to reconcile conflicting theories among this

Court's own opinions and opinions from the Courts of Appeals. Fourth Amendment values may be seriously eroded unless this Court addresses this problem. One commentator has observed:

> If illegally-obtained information is merely stricken and the balance of the affidavit assessed as if the tainted information had never been included, then police are tempted to make illegal searches to bolster what would otherwise be borderline affidavits. If the illegality is never uncovered, then they have a warrant solidly based on probable cause where otherwise their warrant application might have been rejected. If, on the other hand, the illegality does come to light on the subsequent motion to suppress, the police are no worse off than if they had not made the illegal search. Something more . . . is needed to remove this temptation.

W.R. LaFave, *Search and Seizure*, §11.4, p. 651 (1978). Accordingly, this Court should review this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-1315

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON MAXWELL,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

On Petition for Rehearing

(March 15, 1985)

Before GEE, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas Gilligan
United States Circuit Judge

U.S. COURT OF APPEALS
FILED
MAR 15 1985
GILBERT F. GANUCHEAU
Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIFFORD J. ANTONE,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROYCE DAVID HEBERT,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MIKAL HABEEB AMUNY,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AARON MAXWELL,

Defendant-Appellant.

Nos. 84-1299, 84-1302, 84-1308 and 84-1315.

Opinion of the Court of Appeals

Feb. 11, 1985

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before GEE, REAVLEY and RANDALL, Circuit Judges.

GEE, Circuit Judge:

The appellants, Clifford J. Antone, Mikal Habeeb Amuny, Aaron Maxwell, and Royce Hebert, were indicted on charges relating to marijuana possession and distribution. After the district court denied their pretrial motions to suppress evidence, the appellants each pleaded guilty to one count of conspiracy, reserving their rights to appeal the district court's rulings to this Court. We hold that the district court's rulings were correct and affirm the appellants' convictions.

The charges against the appellants in this case arise from the same factual background. Each appellant, however, advances different arguments in this appeal. Our opinion therefore first presents a summary of the facts of the case and then separately analyzes each appellant's claims.

I. Facts

During late October 1982, United States Customs Officer David Harrison received information from a confidential informant who had previously provided Harrison with information that led to six arrests and five convictions on marijuana charges. The informant stated that Allan Granger and a person named Randy were to meet Clifford Antone and Mikal Amuny in Austin, Texas to obtain a quantity of marijuana. The informant also said that the marijuana was to be flown to Austin, but that he did not know where the plane was to land.

Officer Harrison immediately relayed this information to Drug Enforcement Administration (DEA) Agent Richard

Braziel in Austin. Agent Braziel called Robert Nesteroff, a narcotics officer with the Texas Department of Public Safety, and asked him to conduct surveillance of Antone's and Amuny's residences and of a club operated by Antone. Nesteroff did so, but observed nothing out of the ordinary.

On November 1 the informant told Officer Harrison that Granger was in the Austin area and that the marijuana had arrived there. The informant stated that Granger was to meet Antone and Amuny at 7:00 that evening to receive the marijuana, adding that Granger was driving a white and blue Chevrolet Monte Carlo with Texas license number PCQ-658. Harrison relayed this information to Braziel. Braziel, who had been investigating Antone and Amuny since 1979, knew from another reliable informant that Antone usually conducted drug transactions in the parking lots of Jo-Jo's and Denny's restaurants located at the intersection of Oltorf Street and Interstate 35 in Austin and that Antone used a black or Hispanic male to make the pick up and delivery.

Agent Braziel and several other agents established surveillance of the residences of Antone and Amuny and of the Jo-Jo's and Denny's restaurants. Between 7:00 and 7:30 p.m., Braziel saw Antone in the Jo-Jo's parking lot standing next to a black Lincoln Continental registered to Amuny and talking with an unidentified black male. A second black male, later identified as appellant, Aaron Maxwell, climbed out of a Chevrolet pickup camper and walked over to Antone and the unknown man. The three men talked briefly, and Antone and the unknown man then left in the Lincoln. Maxwell followed in his camper, and the two vehicles arrived at Antone's house a short time later.

Officer Nesteroff had been watching Amuny's residence, where a blue Oldsmobile was parked. At about 7:00 p.m.,

a Buick registered to Amuny arrived. Shortly thereafter, Maxwell arrived in the camper, parked, and drove away in the blue Oldsmobile. Maxwell drove first to one of Antone's nightclubs, then to Jo-Jo's restaurant. Meanwhile, the agents at Antone's residence observed Amuny's Buick parked on the wrong side of the street and blocking Antone's driveway. Antone and Amuny got into the Buick and drove to Jo-Jo's. Agents at Jo-Jo's spotted Granger's Monte Carlo at Jo-Jo's at this time.

Ten minutes later, Maxwell left in Granger's Monte Carlo and drove to a nearby convenience store where he made a brief telephone call. He then drove to a house at 1713 Sylvan Drive that the agents believed to be a "stash house" for marijuana. Royce Hebert was the owner of this house. Maxwell drove into the garage, closing the garage door behind him. Agent Braziel, pursuing the car on foot, ran beside the house and hid in bushes near the garage. Braziel heard "thuds" of something heavy being put into the trunk of the car and then heard the trunk lid slammed. The garage door opened and Maxwell drove the car away. Braziel then approached the garage and was able to smell marijuana when he put his nose close to the door.

Maxwell drove Granger's car back to Jo-Jo's and went inside. After a few minutes Granger left the restaurant, got into his car, and drove away. The agents followed Granger to the first traffic light on an access road to the interstate and blocked his car. As the agents approached his car, they noticed a strong odor of marijuana. The agents arrested Granger and later obtained a warrant to search Granger's car. The search disclosed 56 pounds of marijuana in the trunk.

Meanwhile, other agents arrested Antone, Amuny, and Maxwell as they were leaving the restaurant. The agents also obtained a search warrant for the house on Sylvan

Drive. The search of that house disclosed a basement full of marijuana and that the two upstairs bedrooms were being used for growing, drying, and packaging marijuana. The agents also found several firearms in the master bedroom and scales and marijuana processing equipment in the hall closet. The agents found over 800 pounds of marijuana in the house, along with numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices.

After the appellants' arrest, a grand jury returned a three-count indictment against them, which was superceded by a four-count indictment. This indictment charged the appellants with distribution of marijuana, possession of marijuana with intent to distribute, and conspiracy to distribute and to possess with intent to distribute marijuana. The appellants made several pretrial evidentiary motions, which the district court denied. The appellants then entered into plea agreements under which they pleaded guilty to one count of conspiracy and preserved their rights to appeal the district court's rulings on their pretrial motions. The district court accepted the appellants' guilty pleas, sentenced each appellant to five years imprisonment, and fined each $15,000.

II. Discussion of Appellants' Cases

A. Appellant Clifford J. Antone

Antone appeals from the district court's ruling that the agents had sufficient probable cause to arrest him at Jo-Jo's without a warrant and the court's refusal on that basis to suppress his arrest and the search of his person made incident to the arrest. Antone also argues that he pleaded guilty involuntarily and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

Antone contends that the agents lacked probable cause to arrest him at Jo-Jo's without a warrant. Probable cause to arrest exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Woolery*, 670 F.2d 513, 515 (5th Cir.), *cert. denied*, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982). The probable cause issue must be analyzed under the "totality of the circumstances" as to whether there is a "fair probability" that a crime is occurring. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); *United States v. Marbury*, 732 F.2d 390, 395-96 (5th Cir.1984). The probable cause requirement does "not demand any showing that such a belief is correct or more likely true than false." *Texas v. Brown*, 460 US. 730, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

The facts of this case indicate that the agents had probable cause to arrest Antone and to conduct a search incident to the arrest. Before Antone's arrest, the agents had received specific and detailed information concerning the marijuana transaction from informants who had provided reliable information in the past. The informants told the agents when, where, and how the transaction would occur. The agents' surveillance corroborated the informants' tips. These facts, viewed in the totality of the circumstances, established probable cause. *See United States v. Cisneros-Mireles*, 739 F.2d 1000, 1002-03 (5th Cir.1984); *United States v. Mendoza*, 722 F.2d 96, 101-02 (5th Cir.1983).

2. *Factual Basis of Guilty Plea*

Antone next contends that the district court erred in accepting his guilty plea because the government failed to establish a sufficient basis of his guilt. Antone argues that

the facts the government offered show merely that Antone was in the Jo-Jo's restaurant at the time the alleged criminal activity occurred, adding that the district court had no basis to conclude that he understood the charges against him at the time he pleaded guilty because the district court did not inform him of the "esoteric nature of the conspiracy count."

These contentions are meritless. To support a guilty plea, the prosecutor must present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States v. Davila*, 698 F.2d 715 (5th Cir.1983). At the re-arraignment hearing (at which the district court accepted the appellants' guilty pleas), the prosecutor set forth the facts he expected the evidence at trial to show and read pertinent portions of the indictment. He stated that he would introduce evidence to show that the agents observed Antone talking with a black male in Jo-Jo's parking lot on the evening of November 1 and that the agents observed Amuny and Antone drive together from Antone's residence to Jo-Jo's that evening. The prosecutor also stated that he would show that personal documents belonging to Antone were found in the agents' search of the house on Sylvan Drive and that the agents found a beeper device on Antone's person and a corresponding beeper in the house. Finally, the prosecutor stated that eight telephone calls were made from July 1 to October 16, 1982, between a phone used by Allan Granger and Antone's residence or the beeper found on Antone at the time of his arrest. The prosecutor's presentation of these facts provided the district court with a sufficient basis on which to conclude that Antone was guilty of the offense to which he was pleading guilty.[1]

---

[1] In addition, each defendant was present when the indictment was read in open court. Count One, to which the defendants pleaded guilty, stated in pertinent part:

(footnote continued on following page)

In addition, the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter at Antone's sentencing hearing in assessing whether Antone understood the charge against him and the significance of his guilty plea. *See United States v. Araiza,* 693 F.2d 382, 384 (5th Cir.1982). The court specifically asked Antone whether he had committed the offenses charged, and Antone answered, "Yes, sir." The court then asked Antone: "That's what you are pleading guilty to?" and Antone again replied "Yes, sir." Moreover, Antone was represented by two competent and experienced criminal trial attorneys during this phase of the proceedings. Nothing in the record indicates that Antone failed to understand the charges against him. *See United States v. Dayton,* 604 F.2d 931, 938 (5th Cir.1979) (en banc), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980).

3. *Voluntariness of Antone's Plea*

Antone's final contentions concern the voluntariness of his guilty plea and alleged government misconduct.

(footnote continued from preceding page)

> On or about November 1st, 1982, in the Western District of Texas and diverse other places to the grand jurors unknown Defendants Clifford J. Antone, Mikal Habeeb Amuny, Allan Joseph Granger, Royce David Hebert also known as Roy Sneed, and Aaron Maxwell unlawfully, willfully, knowingly did combine, conspire, confederate and agree together and with each other to distribute and possess with intent to distribute marijuana, a Schedule 1 controlled substance contrary to Title 21, United States Code, Section 841(a)(1) and in violation of Title 21, United States Code, Section 846.

Thereafter the court addressed each in identical terms regarding the charge. Antone's colloquy with the court was as follows:

> THE COURT: Mr. Antone, is that what you did?
> MR. ANTONE: Yes, sir.
> THE COURT: That's what you are pleading guilty to?
> MR. ANTONE: Yes, sir.

Antone contends that the government deceived him by stating that only Royce Hebert had standing to object to the search of the house on Sylvan Drive. Because of this "misrepresentation," Antone argues, he believed that the evidence seized in the search of the house could be used against him at trial. Therefore, Antone contends, he pleaded guilty involuntarily. Antone also claims that the government violated its plea agreement with him by providing Texas authorities with information that they used to levy a sales tax on the marijuana transactions in which Antone took part.

These contentions are meritless. The record discloses no action or misrepresentation by the government that prevented Antone from establishing his standing to contest the search. *See Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 425-26, 58 L.Ed.2d 387, 394-95 (1978). Furthermore, the record indicates that Antone had no reasonable expectation of privacy in the house. Finally, the record contains no evidence regarding the Texas tax authorities on Antone's alleged tax liability. This issue is therefore not properly before us.

B. Appellant Mikal Habeeb Amuny

Amuny argues on appeal that the agents lacked probable cause to arrest him at Jo-Jo's restaurant and that the district court had an insufficient factual basis upon which to accept his guilty plea.

1. *Warrantless Arrest*

Amuny contends, as did Antone, that the agents lacked probable cause to arrest him as he left Jo-Jo's restaurant. Amuny's argument is identical to Antone's on this point. For the reasons stated in the discussion of Antone's argument on this issue, we hold that the district court correctly ruled that the agents had sufficient probable cause to arrest Amuny without a warrant.

2. Factual Basis of Guilty Plea

Amuny also contends that the district court had an insufficient factual basis on which to accept his guilty plea. As we have noted earlier, the prosecutor must present evidence sufficient to provide the district court with a basis to conclude to the court's subjective satisfaction that a defendant is guilty of the offense to which he is pleading guilty before the court can accept the guilty plea. *United States v. Davila,* 698 F.2d 715 (5th Cir. 1983). Here, the prosecutor's summary of evidence to be presented at trial (which Amuny quotes and adopts as his statement of what the evidence would have shown) indicates that the district court had ample facts to satisfy itself of Amuny's guilt. These facts included evidence of Amuny's fingerprints, personal belongings, and transaction records found in the house on Sylvan Drive and testimony concerning Amuny's association with the other defendants. The district court did not err in accepting Amuny's guilty plea.

C. Appellant Aaron Maxwell

The sole issue that Maxwell raises on appeal is whether the district court properly denied his motion to suppress evidence taken from the house on Sylvan Drive. After Maxwell's arrest and indictment, he sought to challenge the agents' search of the house. Maxwell contends that he had standing to contest this search and that the magistrate lacked probable cause to issue the warrant. In ruling on Maxwell's motion to suppress, the district court concluded that Maxwell had no standing to object to the search. The court also ruled that the agents' affidavit supporting their request for a search warrant contained sufficient facts to establish probable cause and to justify the magistrate's issuance of a search warrant.

We conclude that the district court correctly ruled that Maxwell lacked standing to contest the search of the

house on Sylvan Drive. A defendant has the burden of establishing his right to contest a search or seizure of a person or property. *United States v. Salvucci,* 448 U.S. 83, 86, 100 S.Ct. 2547, 2549-50, 65 L.Ed.2d 619, 624-25 (1980). To establish standing to contest a search, the defendant must show that he had a "legitimate expectation of privacy" in the area searched. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387, 401 (1978). A defendant's legitimate presence on the searched premises, without more, is insufficient to establish standing. *Id.* at 142-43, 99 S.Ct. 430, 58 L.Ed.2d at 400-01.

Under the standard the Supreme Court has set forth, Maxwell has no standing to contest the search of the house. The agents found no clothes or personal belongings of Maxwell's in the house. Maxwell's fingerprints were found only on a spiral-ring notebook in the house. The only evidence Maxwell presented to the district court in support of his contention were Maxwell's own affidavit and an affidavit of Royce Hebert. The district court's conclusion that Maxwell had no legitimate expectation of privacy in the house and that Maxwell therefore lacked standing to contest the search was correct. *See United States v. Briones-Garza,* 680 F.2d 417, 420 (5th Cir.), *cert. denied,* 459 U.S. 916, 103 S.Ct. 229, 74 L.Ed.2d 181 (1982). The probable cause issue is discussed in the next segment of our opinion.

D. Appellant Royce Hebert

After his arrest and indictment, Hebert moved to suppress all evidence seized from the house on Sylvan Drive, which was his residence. Hebert argued that Agent Braziel's entry onto the premises without a warrant when Maxwell drove into the garage tainted the search of the house conducted after the agents had obtained a warrant. Because of this taint, Hebert contends, the district court was required to suppress the evidence seized in the search as a "fruit of the poisonous tree."

The district court agreed that Braziel's entry onto the premises was illegal. The court, however, refused to suppress the evidence, ruling that even absent Braziel's observations sufficient probable cause existed to justify the issuance of the search warrant. The court therefore used the remedy the Supreme Court authorized in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and "purged the taint" by redacting the portions of the agents' affidavit that related to Braziel's illegal entry. On appeal, Hebert contends that the district court's redaction remedy was insufficient to purge the evidence of the taint of Braziel's illegal entry and that the court should have suppressed the evidence.

A court should interpret a search warrant and its supporting probable cause in a realistic and commonsense manner. *United States v. Maestas,* 546 F.2d 1177, 1180 (5th Cir.1977). Viewing the search warrant involved here in this manner, we conclude that the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry. The affidavit the agents submitted to the magistrate to support their request for a search warrant set out numerous facts in great detail; Agent Braziel's observations constitute only a small part of the information presented to the magistrate. The district court's redaction of the search warrant and the court's ruling on the admissibility of the evidence obtained in the search of Hebert's residence were correct.

For the reasons stated, we conclude that the district court's evidentiary rulings and the court's acceptance of the appellants' guilty pleas were correct. The judgment of the district court is therefore

AFFIRMED

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S.Court of Appeals, Fifth Circuit
By /s/ *H.E. Adams, Jr.*

The District Court's Opinion

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

UNITED STATES OF AMERICA

vs.

CLIFFORD J. ANTONE, MIKAL HABEEB AMUNY, ROYCE DAVID HEBERT a/k/a ROY SNEED, and AARON MAXWELL

CRIMINAL NO. A-82-CR-155
and A-82-CR-153

AMENDED FINDINGS OF FACT

1. On October 28 and October 29, 1982, DEA Special Agent Richard Braziel, in Austin, Texas, was contacted by telephone by Customs Patrol Officer Dave Harrison in Beaumont, Texas. CPO Harrison advised Agent Braziel that he had received information from a confidential informant that Allen Granger and a Randy, last name unknown, were coming to Austin, Texas, to meet Clifford Antone and Mikal Amuny to pick up a quantity of marijuana.

2. Agent Braziel advised Texas Department of Public Safety Narcotics Officer Bob Nestoroff to check the residences of Antone and Amuny during this period of time. Officer Nestoroff observed nothing out of the ordinary.

3. On November 1, 1982, CPO Harrison again telephoned Agent Braziel. CPO Harrison advised Agent Braziel, that according to his confidential informant, an aircraft had landed with a load of marijuana and Granger was in Austin, Texas, to meet with Antone and Amuny that evening to obtain a quantity of marijuana. CPO Harrison further gave a description to Agent Braziel of the automobile by make, color, and license number that Granger was to be driving and transporting the marijuana.

4. CPO Harrison informed Agent Braziel that his confidential informant had supplied reliable information in the past that had led to six arrests and the seizure of a quantity of marijuana and that the informant was obtaining his information through conversations with Granger.

5. Agent Braziel had also received information prior to November 1, 1982, from a separate confidential informant, to the effect that Antone would conduct his marijuana transactions at a restaurant located near IH35 and Oltorf and would utilize a Black male to make the delivery of the marijuana.

6. Based upon this information, Agent Braziel had a surveillance placed on the residences of Antone and Amuny, the club operated by Antone, and the Jo-Jo's and Denny's restaurant located at the intersection of IH35 and Oltorf in Austin, Texas.

7. At approximately 7:00 to 7:30 P.M., on November 1, 1982, Agent Braziel saw Antone at the JoJo's parking lot next to a black Continental registered to Amuny talking to an unknown Black male. A second Black male, later identified as Aaron Maxwell, exited a pickup with a camper shell and walked over and met with Antone and the unknown Black male. Antone and the unknown Black male departed in the Continental automobile and Maxwell departed in the Chevrolet pickup. Agent Braziel lost surveillance and notified other officers by radio.

8. Officer Nestoroff observed the Chevrolet pickup being driven by Maxwell arrive at the residence of Amuny. Maxwell exited the pickup and entered a blue Oldsmobile. Officer Nestoroff followed Maxwell to Antone's club.

9. Agent Braziel located the Continental automobile driven by Antone at Antone's residence. Braziel observed two people enter a Buick automobile located at Antone's residence and depart the premises. Officer Nestoroff eventu-

ally picked up surveillance of the Buick automobile and identified the driver as Amuny and Antone as the passenger. Officer Nestoroff followed the vehicle back to the JoJo's restaurant located at IH35 and Oltorf.

10. At the JoJo's restaurant, Agent Braziel and Officer Nestoroff additionally observed in the parking lot the blue Oldsmobile previously driven by Maxwell and the vehicle CPO Harrison advised Granger would be driving.

11. Maxwell was subsequently observed entering Granger's vehicle and driving to a 7-11 convenience store where he made a phone call. He is then observed driving to 1713 Sylvan Drive where he enters the garage and the door is closed. Agent Braziel pursues Maxwell on foot and places himself next to the house in some bushes.

12. Agent Braziel walked up to the garage door and heard the trunk open, something being loaded into the trunk, and the trunk closed. He also smelled the odor of marijuana. The garage door then opened and Maxwell exited the residence in Granger's vehicle. Surveillance followed Maxwell back to the JoJo's restaurant from where he had originally departed in Granger's vehicle.

13. Maxwell was observed getting out of the vehicle and walking into the JoJo's restaurant. Shortly thereafter, Granger walked out of the restaurant and entered his vehicle. He was arrested by Agent Braziel and others while stopped at a red light. At the time of his arrest Agent Braziel noticed the odor of marijuana coming from Granger's vehicle.

14. Agent Braziel seized Granger's vehicle and obtained a search warrant. A search of the vehicle revealed three bundles of marijuana in the trunk weighing approximately 58 pounds.

15. Agent Braziel obtained a federal search warrant for the residence of 1713 Sylvan Drive. The search of that residence resulted in the seizure of approximately 1,000 pounds of marijuana, scales and packaging material for marijuana, personal documents of Antone's and Amuny's, and fingerprints of Amuny and Maxwell.

16. A post search investigation, revealed the residence at 1713 Sylvan Drive had been leased to Roy Sneed who was identified as being Royce Hebert.

17. Seized at the time of the arrest and searched without a warrant were the Buick automobile driven by Amuny and the Oldsmobile driven by Maxwell. Both automobiles were seized from the parking lot of JoJo's restaurant subsequent to the arrests. Agent Braziel testified these cars were seized for forfeiture purposes and because of his community caretaking functions.

18. A post search investigation of 1713 Sylvan Drive found no indicia of residence for Aaron Maxwell. No keys, clothes, or any other fact would show he resided at that address.

Conclusion of Law Regarding Clifford J. Antone and Mikal Amuny.

The Court concludes that there are sufficient facts to establish probable cause to arrest the Defendants Clifford J. Antone and Mikal Habeeb Amuny for their participation as part of the conspiracy. This probable cause is sufficient to arrest without a warrant. The informant's information provided sufficient detailed facts that the officers could conclude that there was probable cause to believe a crime had been committed. The simple facts of a meeting at a restaurant take on a much greater meaning based upon the information that the surveilling agents had obtained from their informants. These facts provide the probable

cause that this Court finds is sufficient to allow the arrest in a public place. The past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois v. Gates*, 103 S.Ct. 2317, 1983. The Court finds that a person validly arrested on probable cause is subject to search without a warrant. The lawful arrest authorizes such search of the defendants. *Michigan v. DeFillippo*, 443 U.S. 31. Defendants Amuny and Antone lack standing to contest the search of 1713 Sylvan Drive. In order for these defendants to contest this search they must show a privacy expectation regarding the contents of that home. The burden is upon the defendants to do so and the Court observes there has been no evidence produced by these defendants to support any claim they may have. *U.S. v. Salvucci*, 448 U.S. 83 (1980), and *Rakas v. Illinois*, 439 U.S. 128 (1978).

The Court finds the vehicles of Defendant's Amuny and Antone were subject to seizure and forfeiture and properly the subject of an inventory search. *See U.S. v. Staller*, 616 F.2d 1284 (5th Cir. 1980).

Conclusion of Law Regarding Aaron Maxwell

The Court finds that there are insufficient facts to support the argument of defendant that he has standing to contest the search at 1713 Sylvan Drive. Defendant's standing argument is based upon his affidavit stating he had a privacy interest in the residence. This affidavit alone is not sufficient in the Court's view. The Court finds no other indicia indicating the Defendant made 1713 Sylvan Drive his residence. This Court will not deny the admission of the affidavit as evidence but will give as much weight as this Court's judgment and counsel may allow. *U.S. v. Matlock*, 415 U.S. 164. As noted in *U.S. v. Briones-Garza*,

680 F.2d 417, whether a person has a reasonable expectation of privacy turns on the facts of each case. The Court concludes that the facts are insufficient to support defendant's allegation of residence in this cause. The Court additionally concludes that sufficient probable cause exists based upon the facts provided by the informant and the observance and surveillance of the arresting officers to allow the defendant to be arrested without an arrest warrant.

Conclusion of Law Regarding Royce David Hebert

The Court concludes and the Government concedes that Royce David Hebert has a privacy interest in the home found at 1713 Sylvan Drive, Austin, Texas. The Court concludes that Special Agent Braziel trespassed upon the property of 1713 Sylvan Drive while at night and that by listening at the garage door and pressing his noise [sic] to that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant. *See Payton v. New York*, 445 U.S. 573. The curtilage of a private home is given a greater privacy expectation than an ordinary building or an automobile. *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974). These facts present a severe invasion of privacy. *U.S. v. Davis*, 423 F.2d 974 (5th Cir. 1970). Therefore any information gathered during that search shall be struck from the affidavit. *Franks v. Delaware*, 98 S.Ct. 2674 (1978). The Court having excluded the statement in the affidavit regarding the three thuds heard by Agent Braziel finds that the affidavit contains sufficient remaining facts to support the search of 1713 Sylvan Drive. The Court concludes that there was sufficient evidence to connect the residence to the smuggling of marijuana. The Court additionally concludes that this information was not stale. The facts and circumstances described in the affidavit are sufficient to warrant a man of

reasonable caution to believe marijuana was located at 1713 Sylvan Drive. *U.S. v. Minis,* 666 F.2d 134 (5th Cir. 1982).

SIGNED and ENTERED this 30th day of January, 1984.

/s/ James R. Nowlin

James R. Nowlin
UNITED STATES DISTRICT JUDGE

Affidavit of Agent Braziel

On 11/1/82 S/A Richard E. Braziel of the Austin, Texas Drug Enforcement Administration recieved [sic] information from US Customs Patrol Officer Dave Harrison that he had recieved [sic] information from a previously reliable confidential informant that had supplied credible and reliable information in the past that had led to six arrests and the seizure of a quantity of marijuana and vehicles used to transport the marijuana. This informant advised officer on 11/1/82 that Allen Granger was in Austin, Texas; that Allen Granger was to meet with Clifford Antone and Mikal Amuny for the purpose to recieve [sic] a quantity of marijuana from Antone and Amuny; that Allen Granger was driving a white and blue 1977 Chevrolet Monte Carlo bearing 1983 Tx PCQ658 into which the marijuana was to be loaded and transported; further that Allen Granger was to meet with Clifford Antone and Mikal Amuny on the evening of 11/1/82 to recieve [sic] the marijuana. Further, the informant was told this information by Allen Granger.

Prior to 11/1/82 S/A Braziel had recieved [sic] information from an informant who had supplied information on marijuana traffickers which S/A Braziel had been able to cooberate [sic] by independent sources other than the informant. This informant told S/A Braziel that Clifford Antone previously used a restraunt [sic] near the intersection of IH35 and Oltorf, Austin, Texas to conduct narcotics business. Further, after narcotics transactions were completed with Clifford Antone that a black male would usually load the buyers vehicle at a garage in a residence. Further, the marijuana would be delivered by the black male.

On the evening of 11/1/82 surveillance was established on Clifford Antone, Mikal Amuny and Aaron Maxwell in Austin, Texas. The surveillance observed these three subjects meet with Allen Granger and another unidentified individual at the JoJo's restraunt [sic] located at 1605 E. Oltorf at the intersection of IH35 in Austin, Texas. The

surveillance officers also observed the previously described blue and white 1977 Chevrolet bearing 1983 Tx license PCQ658 parked behind JoJo's restraunt [sic]. Also parked with the blue 1973 Oldsmobile bearing 1983 Tx license AEM816 previously driven by Aaron Maxwell. A blue 1982 Buick bearing 1983 Tx license 922AST in which Mikal Amuny and Clifford Antone arrived at JoJo's restraunt [sic] was parked in front of the restraunt.

The surveillance observed Aaron Maxwell, a black male, exit JoJo's restraunt [sic] and enter the blue and white 1977 Chevrolet bearing 1983 Tx license PCQ658 and drive it to 1713 Sylvan Drive, in Austin, Texas a few blocks from the JoJo's restraunt [sic]. S/A Braziel observed the vehicle pull into the garage and the garage door then closed. S/A Braziel further heard a car trunk lid being opened. Further S/A Braziel heard a noise like heavy objects being thrown in a trunk of a vehicle, after which the trunk lid slamed [sic]. The garage door opened and the blue and white Chevrolet bearing 1982 Texas license PCQ658 driven by Aaron Maxwell backed out of the garage. The vehicle driven by Aaron Maxwell exited the driveway. As it backed to the street the garage door closed. The vehicle was maintained under surveillance to the original parking location behind JoJo's restraunt [sic] where Aaron Maxwell parked the vehicle described as the white and blue 1977 Chevrolet bearing 1983 Tx license PCQ658. Aaron Maxwell then reentered the restraunt [sic] and join Clifford Antone, Mikal Amuny and Allen Granger and the unidentified individual.

A few minutes later all of the subjects exited the JoJo's restraunt [sic], Allen Granger entered the white and blue Chevrolet bearing 1983 Texas license PCQ658 which had been parked by Aaron Maxwell. Allen Granger exited the parking lot and was stopped at the intersection of IH35 Frontage Rd northbound and Oltorf in Austin, Texas. S/A Braziel, TxDPS Officer Robert Nestoroff and US

Affidavit of Agent Braziel

Customs Officer Brian Quick identified themselves as law enforcement officers and and removed Allen Granger from the 1977 Chevrolet vehicle. S/A Braziel easily detected the strong odor of marijuana coming from the vehicle. TxDPS Sgt Kenneth Disnukes, Travis County Deputy Cary Young, and US Customs Officer Frank Grimes attempted to effect the arrest of Clifford Antone, Mikal Amuny, Aaron Maxwell and the unidentified individual at the front of JoJo's restaunt [sic]. However, the unidentified individual evaded arrest. Clifford Antone, Mikal Amuny and Aaron Maxwell were arrested.

/s/ R E Braziel

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
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Nos. 84-1748, 84-1812, 84-1864 and 84-1878

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROYCE DAVID HEBERT, PETITIONER
v.
UNITED STATES OF AMERICA

CLIFFORD J. ANTONE, PETITIONER
v.
UNITED STATES OF AMERICA

MIKAL HABEEB AMUNY, PETITIONER
v.
UNITED STATES OF AMERICA

AARON MAXWELL, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the guilty plea proceedings showed that petitioners Antone and Amuny understood the nature of the charges against them, and whether there existed a sufficient factual basis to support the district court's acceptance of their pleas.

2. Whether there was probable cause to arrest petitioners Antone and Amuny.

3. Whether the evidence seized pursuant to a search warrant was the fruit of an antecedent illegal search (petitioners Maxwell and Hebert).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1748

ROYCE DAVID HEBERT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1812

CLIFFORD J. ANTONE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1864

MIKAL HABEEB AMUNY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1878

AARON MAXWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8a-20a)[1] is reported at 753 F.2d 1301. The opinion of the district court (Pet. App. 1a-7a) is unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-1864.

JURISDICTION

The opinion of the court of appeals was rendered on February 11, 1985, and rehearing was denied for Nos. 84-1812 and 84-1878 on March 15, 1985; and for No. 84-1864 on March 25 (rehearing was not sought in No. 84-1748). The petitions for a writ of certiorari were filed in No. 84-1748 on May 4, 1985; in No. 84-1878 on May 9, 1985; in No. 84-1812 on May 14, 1985; and in No. 84-1864 on May 24, 1985. The petition in No. 84-1748 was not timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the United States District Court for the Western District of Texas on charges relating to marijuana possession and distribution. Following the district court's denial of petitioners' motions to suppress evidence, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846, reserving their rights to appeal the district court's rulings. Each petitioner was sentenced to five years' imprisonment and a $15,000 fine. The court of appeals affirmed.

1. On October 28 and 29, 1982, Customs Patrol Officer Harrison contacted DEA Special Agent Braziel and informed him that Allen Granger and an individual identified as "Randy" were on their way to Austin, Texas, to meet petitioners Clifford Antone and Mikal Amuny to pick up a quantity of marijuana, which was being flown there.[2] Harrison advised Braziel that he had received this information from a confidential informant who in the past had provided information leading to six arrests and the seizure of a quantity of marijuana, and that the informant was getting his

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[2]Unless otherwise indicated, the statement of facts is taken from the opinions of the court of appeals and the district court.

information in this instance through conversations with Granger. On November 1, 1982, Harrison advised Agent Braziel that the marijuana had been landed in Austin and that Granger, driving a blue and white Chevrolet Monte Carlo with Texas license plate number PCQ-658, would meet Antone and Amuny at 7:00 that evening to pick up the substance.

As a result of prior investigations of Antone and Amuny, Braziel was aware from a separate source that Antone conducted marijuana transactions at JoJo's Restaurant near the intersection of Interstate 35 and Oltorf Road in Austin, Texas, and that he used a black or Hispanic male to deliver the marijuana. Braziel placed the restaurant at that intersection under surveillance on the evening of November 1, 1982. He saw Antone and an unidentified black male meet with petitioner Aaron Maxwell in the restaurant parking lot. Maxwell subsequently drove to Amuny's residence, left his pickup there, and drove back to JoJo's in another car. In JoJo's parking lot, Maxwell entered Granger's vehicle—the blue and white Chevrolet Monte Carlo with Texas license plate PCQ-658 that the informant had identified—drove to a convenience store, used its phone, and proceeded to a residence leased by petitioner Royce Hebert. When Maxwell drove the car into the garage and closed the door, Agent Braziel followed him on foot, and, while hiding in the bushes near the garage, heard the trunk of a car open, something being loaded into the trunk, and the trunk close. When he put his nose close to the garage door, he smelled marijuana. Maxwell then drove Granger's automobile back to JoJo's restaurant and went inside. Shortly thereafter, Granger walked out of the restaurant, drove away in his car, and was arrested at a red light. As the arresting officers approached Granger's car, they smelled marijuana. Agent Braziel seized the automobile and, after a warrant to search it was obtained, discovered 58 pounds of marijuana in the car trunk.

Meanwhile, other agents arrested Antone, Amuny,[3] and Maxwell as they were leaving JoJo's restaurant. Agent Braziel also obtained a federal search warrant for Hebert's residence. That search uncovered over 800 pounds of marijuana, several firearms, scales, processing and packaging equipment, and numerous documents and ledgers indicating marijuana buyers, amounts purchased, and prices. A beeper device found on Antone's person incident to his arrest corresponded to a beeper found in the house. Eight phone calls had been made by Granger to Antone's home or the beeper prior to the arrests. See 84-1864 Pet. 5; Jan. 30, 1984 Tr. of Re-Arraignment Proceeding [hereinafter cited as Tr. of Re-Arraignment] 42. Finally, the search revealed personal documents of Antone and Amuny, and fingerprints of Amuny and Maxwell.

2. The district court denied motions to suppress the evidence discovered in the search of Hebert's residence. It concluded (Pet. App. 5a-6a) that Maxwell, Antone, and Amuny did not have "standing" to challenge that search. Despite an affidavit submitted by Maxwell asserting a privacy interest in Hebert's residence, a post-search investigation did not reveal any keys, clothes, or other indicia that he resided there (*id.* at 4a-5a, 6a). Antone and Amuny did not produce any evidence to support any claim they might have had to a privacy expectation in the contents of the home (*id.* at 5a).

Hebert's argument that the search warrant authorizing the search of his residence was tainted by Agent Braziel's preceding unlawful search of the property was rejected on the merits. The district court agreed that Agent Braziel trespassed on the property of Hebert's residence, reasoning that "listening at the garage door and pressing his nose to

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[3]Earlier in the evening, Antone and Amuny had driven to JoJo's together from Antone's house.

that door constituted an invasion of the curtilage of that property sufficient to constitute a search without warrant" (Pet. App. 7a). Accordingly, the district court, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978), struck from the affidavit supporting the search the statement regarding the three thuds Agent Braziel heard while listening at the garage (Pet App. 7a).[4] Even without that information, however, the court found that "the affidavit contains sufficient remaining facts to support the search" and denied Hebert's motion to suppress (*ibid.*).

The district court also concluded (Pet. App. 5a-6a) that there was probable cause to arrest Amuny, Antone, and Maxwell. (Hebert did not challenge the lawfulness of his arrest, apart from his effort to suppress the evidence at his residence.) The court noted that the informant's information provided sufficient detailed facts from which the officers could believe that a crime was being committed, and that the "past reliability of the informant and the corroboration of other law enforcement officers' independent investigation meets the totality of the circumstances test of *Illinois* v. *Gates*, [462 U.S. 213 (1983)]" (Pet. App. 5a).

Having lost their pretrial motions, petitioners each pleaded guilty to one count of conspiracy to possess marijuana with intent to distribute. They reserved the right to appeal the district court's rulings on the suppression motions, and did so.

3. The court of appeals affirmed. After reviewing the summary of the evidence presented by the prosecutor at the

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[4]The warrant application, signed by Braziel, set out in five detailed paragraphs the facts briefly described at pages 2-4, *supra*. The two sentences redacted out read: "Special Agent Braziel further heard a car trunk lid being opened. Further, Special Agent Braziel heard a noise like heavy objects being thrown of a trunk in a vehicle, after which the trunk lid slammed." See U.S. Br. in the Court of Appeals 17-19.

rearraignment, the court rejected arguments by Antone and Amuny that there was not a sufficient factual basis to warrant the district court's acceptance of their pleas (Pet. App. 14a-16a, 17a-18a). The court similarly rejected Antone's contention that the district court had no basis to conclude that he understood the charges against him, finding instead that "the district court followed the dictates of Rule 11 of the Federal Rules of Criminal Procedure to the letter" in determining that Antone understood the charges, and that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a). The court below also concluded (*id.* at 13a-14a, 17a) that there was probable cause to arrest Antone and Amuny. The court reasoned that the agents had received "specific and detailed information" of "when, where, and how" the marijuana transaction would occur from "informants who had provided reliable information in the past," and that the agents' own surveillance had corroborated those tips (*id.* at 14a).[5]

Finally, the court of appeals agreed with the district court that Maxwell lacked standing to challenge the search of Hebert's residence because he had no legitimate expectation of privacy in it, and it rejected Hebert's argument that the district court was required to suppress the evidence seized in the search of the house because the warrant was tainted by Agent Braziel's earlier trespass (Pet. App. 18a-20a). Reasoning that the warrant "set out numerous facts in great detail," of which Agent Braziel's observations constituted "only a

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[5]Antone also argued to the court of appeals that the government deceived him by stating that only Hebert had standing to object to the search of his house and that the government violated its plea agreement with him by providing Texas authorities with information they used to levy a sales tax on his marijuana transactions. The court of appeals rejected these claims as "meritless" and without basis in the record (Pet. App. 16a-17a), and Antone does not raise them in his petition.

small part," the court found that "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*id.* at 20a).

ARGUMENT

The fact-bound issues raised by petitioners were correctly decided by the courts below and involve no points regarding which there is disagreement among the circuit courts. Further review by this Court is unwarranted.

1. Petitioners Antone and Amuny contend that their guilty pleas are invalid because the charges against them were not adequately explained in the Rule 11 proceeding. They claim further that their pleas were erroneously accepted because they were not supported by a sufficient factual basis. These claims are without merit.

a. Petitioners Antone and Amuny [6] maintain (84-1812 Pet. 6-9; 84-1864 Pet. 13-17) that the court of appeals utilized the wrong standard in ascertaining whether the record established that they understood the nature of the charges to which they pleaded guilty. Antone, for instance, contends that the court of appeals' conclusion that "[n]othing in the record indicates that [he] failed to understand the charges against him" (see Pet. App. 16a) is a "negative standard" that conflicts with decisions of this Court, earlier decisions of the court below, and decisions in other circuits (84-1812 Pet. 6). Without suggesting that they in fact failed in the slightest to understand the charge to which they pleaded, petitioners assert that these decisions, and Rule 11 of the Federal Rules of Criminal Procedure, establish that the record of a guilty plea's acceptance must affirmatively demonstrate a defendant's understanding of the charges against him, which, they contend, the record here does not do.

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[6] We note that Amuny did not raise this claim before the court of appeals.

The record here, however, *does* affirmatively demonstrate that petitioners understood the nature of the charges to which they pleaded guilty, thus undercutting the premise of their contention. As the court below determined, the proceedings fully comported with Rule 11. The statement by the court seized upon by petitioner Antone as evincing the use of a "negative standard" supports their contentions only if taken wholly out of context.

At the rearraignment, the district court judge meticulously assessed whether petitioners understood the charges to which they were pleading guilty. Petitioners said they understood the charges (Tr. of Re-Arraignment 30), had no questions about them (*ibid.*), had discussed them with their lawyers (*id.* at 18, 24-25, 29), and had done and were pleading guilty to what the indictment said (*id.* at 37). The lawyers too expressed their belief that petitioners understood the proceedings (*id.* at 6). The district judge also found that petitioners "fully understood the charges" (*id.* at 47). Besides the fact that each petitioner and his lawyer said he understood the charges, there was abundant other evidence to support the district judge's finding. Petitioners were told twice that they were being charged with conspiracy to possess and distribute marijuana (*id.* at 23), a reasonably self-explanatory charge that is not difficult to understand. See *United States* v. *Dayton*, 604 F.2d 931, 938, 941-943 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Amuny had a college degree (Tr. of Re-Arraignment 5) and had been convicted of possession of marijuana before (84-1864 Pet. 6); Antone had graduated from high school (Tr. of Re-Arraignment 5). Each heard the indictment (*id.* at 35-37) and the outline of the evidence the government would present read to him at the rearraignment (*id.* at 38-42). It was, therefore, correct for the district court to conclude that petitioners understood the charges against them—and for

the court of appeals to find this conclusion supported by the record. Compare *Brown* v. *Perini*, 718 F.2d 784 (6th Cir. 1983).[7]

Moreover, even if it were concluded that a more detailed explanation of the charge was required by Rule 11, the failure to do so would be harmless error here in light of the extensive record at the rearraignment hearing. See Fed. R. Crim. P. 11(h). It is simply implausible that these defendants, both represented by counsel, and both competent and reasonably well-educated, would not be able to understand a rather simple charge presented to them in the well-explained context it was (of course, petitioners do not assert that they did not in fact understand the charge). As the Advisory Committee noted when recommending the addition of an explicit harmless error provision in 1983, "Rule 11 should not be given such a crabbed interpretation that ceremony [is] exalted over substance."[8] While the cases

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[7]In the cases cited by petitioner Antone (84-1812 Pet. 7-9), the district court record had substantially less evidence in it that defendant understood the charges against him. Moreover, a number of the cases he cites involved instances where the record contained affirmative evidence that the guilty plea was in some way actually defective, which no one argues is the case here. Cases more on point than petitioner's include: *United States* v. *Thompson*, 680 F.2d 1145, 1153-1155 (7th Cir.), cert. denied, 459 U.S. 1089 (1982) and 459 U.S. 1108 (1983) ("It is sufficient if the colloquy between the court and the defendant would lead a reasonable person to believe that the defendant understood the nature of the charge."); *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977) (discussed note 8, *infra*); *Seiller* v. *United States*, 544 F.2d 554, 562-563 (2d Cir. 1975) ("We hold that the district court here was amply justified in relying on the reading of the indictment, coupled with [defendant's] discussions with his attorney, his age (47), his university education, his representation by counsel, his 'alacrity of responses and his show of intelligence'—in short, the court's total impression of the defendant and his understanding of the proceedings—to establish that [he] understood the nature of the charges" (citations omitted).).

[8]An illustration of harmless error under Rule 11(h) given by the Committee was "where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime

cited by petitioner Antone (84-1812 Pet. 7-9) are otherwise distinguishable as well (see note 7, *supra*), all but two antedate Rule 11(h) and only one—another Fifth Circuit case—reverses a conviction after consideration of the rule.[9] The new rule is already changing the law in the circuits. See *United States* v. *de le Puente*, 755 F.2d 313, 314-315 (3d Cir. 1985), petition for cert. pending, No. 85-178; *United States* v. *Stead*, 746 F.2d 355, 356-357 (6th Cir. 1984), cert. denied, No. 84-6137 (Mar. 4, 1985); see also *United States* v. *Kearney*, 750 F.2d 787, 790-791 (9th Cir. 1984).

Especially in light of its conclusion that there was no violation of Rule 11, the court of appeals' statement that "[n]othing in the record indicates that Antone failed to understand the charges against him" (Pet. App. 16a) cannot reasonably be understood to establish some significant new standard for assessing Rule 11 violations. Rather, the statement appears to mean simply that there is nothing in the record of the plea proceedings that undercuts the conclusion suggested by that record that petitioners understood the charges to which they pleaded guilty. In light of the record and the court's entire opinion, it is abundantly

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was not mentioned, but the defendant's responses clearly indicate his awareness of that element." The note approvingly cites *United States* v. *Coronado*, *supra*, where, as the Committee had explained earlier, the court first held that the charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then found no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that [defendant] understood them" (554 F.2d at 173).

[9] *United States* v. *Corbett*, 742 F.2d 173, 178-179 (5th Cir. 1984), found a Rule 11 proceeding prejudicially defective where the information counts were not read to defendant and defendant had not received a copy of them. As discussed above, that is not the case here.

clear that petitioners understood the charges to which they pleaded guilty. Thus, their claim was properly rejected.[10]

b. Antone and Amuny also maintain (84-1812 Pet. 9-12; 84-1864 Pet. 7-12) that there was not a sufficient factual basis to support the district court's acceptance of their guilty pleas. However, the prosecutor recited a convincing and lengthy factual basis (84-1864 Pet. 3-7), and read pertinent portions of the indictment in support of the pleas of guilty (Tr. of Re-Arraignment 34-37). In summary, he stated that he would introduce evidence that on November 1, 1982, Antone met with petitioner Maxwell at JoJo's parking lot. Later, Antone and Amuny drove together from Antone's home to JoJo's Restaurant. Maxwell, meanwhile, drove to Amuny's residence, switched cars, and returned to the restaurant. Maxwell then picked up Granger's car, drove to Hebert's residence, and returned to JoJo's. The driver of the car, Granger, was then arrested and 58 pounds of marijuana found in the trunk of the automobile. Personal documents belonging to Antone and Amuny were found in the search of the residence which also uncovered approximately 800 pounds of marijuana. Also found during the search were Amuny's fingerprints and a beeper that corresponded to one worn by Antone. Eight phone calls from Granger were made to Antone's home or beeper from July 1 to October 16, 1982. Several days prior to the arrests, Amuny's car was observed at Browning Aerial Service at

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[10]Petitioner Antone further argues (84-1812 Pet. 11-12) that his plea cannot have been voluntary because he did not admit that the evidence the government would present was true (Tr. of Re-Arraignment 44). On its face this argument seems to go to the factual basis of the plea (Fed. R. Crim. P. 11(f)), rather than its voluntariness (Rule 11(d)), though it is unconvincing in that context as well (see note 11, *infra*). In any event, even with petitioner's eleventh-hour reservations about whether he would endorse the government's evidence, there was more than enough in the record to support the district court's finding, and the court of appeals' affirmance, that the plea was voluntary, understanding, *and* factually based.

the Austin Airport. Amuny had been convicted in 1973 of possession of 150 pounds of marijuana. Finally, because of the evidentiary proceedings on the motion to suppress, the judge was aware of additional facts supporting the charges against petitioners (see Pet. App. 1a-7a).

Thus, the district court specifically found that there was a factual basis to support each of the defendants' pleas (Tr. of Re-arraignment 47). Following a review of the prosecutor's proffer to the district court and of the indictment, the court of appeals agreed (Pet. App. 14a-15a, 17a-18a). Given these concurrent factual findings by both lower courts, review by this Court of petitioners' fact-bound claims is unwarranted.[11]

2. Petitioners Antone and Amuny also contend (84-1812 Pet. 4-6; 84-1864 Pet. 17) that their arrests were not supported by probable cause. Since it does not appear that any evidence used by the prosecution was seized from petitioner

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[11]Antone confuses (84-1812 Pet. 10-12) the voluntariness issue with the sufficient factual basis issue (see note 10, *supra*). As we discuss in the preceding point, his plea was voluntary; it also had a sufficient factual basis. It is not necessary to the existence of a sufficient factual basis that defendant admit the facts the prosecution says it will present; all that is necessary, as the Fifth Circuit said (Pet. App. 14a), is that "the prosecutor * * * present evidence to the subjective satisfaction of the district court which indicates that a defendant actually committed the offense to which he is pleading guilty. *United States* v. *Davila*, 698 F.2d 715 (5th Cir. 1983)." See also *United States* v. *Dayton*, 604 F.2d 931, 938 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980). Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). Despite Amuny's and Antone's arguments that there was an inadequate factual basis for the conspiracy and intent elements of the charge, respectively, the evidence outlined above could certainly satisfy a judge that those elements were present. (There is also no indication here of any motive for petitioners to plead guilty to crimes they did not commit, especially if they thought the prosecutor possessed an inadequate factual basis to establish guilt. Compare *North Carolina* v. *Alford*, *supra*.)

Amuny incident to his arrest, the legality of that arrest is immaterial to the validity of his conviction. In any event, for many of the same reasons that there existed an adequate factual basis for petitioners' guilty pleas, there was also probable cause for their arrests.

Before the arrests, the agents had received "specific and detailed information" from reliable informants concerning a planned sale of marijuana by petitioners to Granger (Pet. App. 14a). As the court of appeals observed, the "informants told the agents when, where and how the transaction would occur," and "the agents' surveillance corroborated the informants' tips" (*ibid.*). For instance, Antone was observed meeting with Maxwell at a location identified by an informant as the likely site of the transaction, Maxwell then drove to Amuny's and later drove Granger's car, with the make and license plate identified by the informant, to Hebert's to pick up the marijuana, returning to the restaurant where Granger waited and where petitioners were also present. Viewed in the "totality of the circumstances" (see *Illinois* v. *Gates*, 462 U.S. 213 (1983)) there was ample basis for the findings below that probable cause existed to arrest Antone and Amuny (Pet. App. 7a, 17a-18a).

3. Petitioners Maxwell[12] and Hebert contend (84-1878 Pet. 10-14; 84-1748 Pet. 7-11) that the evidence discovered

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[12]Petitioner Maxwell was held by the courts below to lack "standing" to challenge the warrant to search Hebert's house, on the ground that he had failed to establish a reasonable expectation of privacy in those premises (Pet. App. 6a, 18a-19a). He contends (84-1878 Pet. 7-10) that his right of access to the house was indeed sufficient to afford him a right of privacy therein. We think that both petitioner and the courts below address the wrong question. The relevant privacy interest is not that affected by the execution of the warrant, but that infringed by the action found to be illegal—Agent Braziel's trespass upon the property to hear and smell what was happening in the garage. While this entirely distinct "standing" issue raises an interesting, if somewhat obscure, point, there is surely no need to consider it here because, as explained in text, the evidence seized under the warrant was not a fruit of any illegality committed by Agent Braziel.

during the search of Hebert's residence should have been suppressed because the search warrant was tainted by Agent Braziel's earlier illegal trespass on Hebert's property. This contention was rejected on the ground that the showing of probable cause to support issuance of the warrant did not depend on the information thus gained (Pet. App. 13a). In such circumstances, the courts have traditionally held that evidence seized pursuant to the warrant is not a tainted fruit of the illegally obtained information contained in the warrant affidavit. See, *e.g., United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13-15; *United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Taborda,* 635 F.2d 131, 140-141 (2d Cir. 1980); *United States* v. *House,* 604 F.2d 1135, 1143 (8th Cir. 1979), cert. denied, 445 U.S. 931 (1980); *United States* v. *Watts,* 540 F.2d 1093, 1095 n.2 (D.C. Cir. 1976). See also *United States* v. *Marchand,* 564 F.2d 983, 992-995 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (Friendly, J.) (collecting the cases and discussing the rule's rationale). This Court has applied the same analysis in deciding whether deliberately or recklessly false averments in the affidavit invalidate the warrant. *Franks* v. *Delaware,* 438 U.S. 154, 171-172 (1978).[13]

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[13]There is not, as suggested by petitioner Maxwell (see 84-1878 Pet. 13), a conflict among the circuits on the appropriate standard to apply when assessing a search warrant containing information from an antecedent illegal search. Contrary to Maxwell's claim, the Sixth Circuit does follow the approach in *Franks* and *Karo,* and will uphold a warrant if, after excluding illegally obtained information, the balance of the affidavit establishes probable cause. See, *e.g., United States* v. *Smith,* 730 F.2d 1052, 1056 (6th Cir. 1984); *United States* v. *Korman,* 614 F.2d 541, 547 (6th Cir.), cert. denied, 446 U.S. 952 (1980). The two cases cited by petitioner are not in any way inconsistent with the approach taken in *Franks* and *Karo*—see *United States* v. *Giordano,* 416 U.S. 505, 556 n.6 (Powell, J., concurring in part and dissenting in part); *United States* v. *Grunsfeld,* 558 F.2d 1231, 1241 (6th Cir.), cert. denied, 434 U.S. 872 (1977) and 434 U.S. 1016 (1978)—and were, in any event, decided before them and the more recent Sixth Circuit cases. Maxwell does not claim that any other circuit (besides the Sixth) is in disagreement with the approach taken by the Fifth Circuit in this case.

Petitioners suggest that this analysis has been placed in doubt by *Segura* v. *United States,* No. 82-5298 (July 5, 1984). In Hebert's view (84-1748 Pet. 7-11), *Segura* formulated a test that looks instead to whether the prior illegal intrusion contributed in any way to the discovery of the evidence seized under the search warrant. We are not sure that this formulation reaches a result different from the traditional approach: if there is probable cause even after the illegal evidence is excised from the warrant, it is difficult to see how it contributes to the finding of subsequent evidence. Similarly, the "critical element" formulation advocated by petitioner Maxwell (84-1878 Pet. 10-13) appears to be, even on its own terms, really nothing more than the traditional *Franks* test: if there was adequate evidence to support the warrant when the illegal evidence is excised (*i.e.,* if that evidence is not "critical"), then the warrant is valid. See *Segura,* slip op. 19. That test is met here.

In any event, petitioners' contention that *Segura* creates a new rule is absurd. This Court gave no indication it was undertaking such a dramatic reversal; indeed, just two days earlier, in *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op. 13, the Court had reaffirmed the *Franks* approach. In *Karo,* in the context of cleansing a tainted warrant, the Court stated that, despite the presence in the supporting affidavit of illegal evidence, "if sufficient untainted evidence was presented in the warrant affidavit to establish probable cause, the warrant was nonetheless valid." That is precisely the situation here. *Segura,* on the other hand, had nothing to do with a "cleansed" warrant.

In any event, *Segura* stated that "[w]hether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized" (slip op. 17) and that "our cases make clear that evidence will not be excluded as 'fruit' unless the illegality is

at least the 'but for' cause of the discovery of the evidence" (*id.* at 19). These principles, of course, would indicate that *Franks* and *Karo* are still viable. So does *Segura's* holding: if the illegal prior entry there did not invalidate an otherwise valid search warrant, there is no reason why the prior trespass here should invalidate a search warrant valid once cleansed. Petitioners' attempt to manufacture a new—and vague and confusing—standard from *Segura* by taking phrases from it out of context is wholly unconvincing.

Only two sentences in Braziel's lengthy affidavit (see note 4, *supra*) contained evidence relating to his earlier observations at Hebert's residence, which the district court believed were the product of an impermissible trespass.[14] The district court reviewed the warrant, leaving out those two sentences, and found that it contained "sufficient remaining facts to support the search" (Pet. App. 7a). As the court of appeals observed (*id.* at 20a), the "request for a search warrant set out numerous facts in great detail," of which Agent Braziel's allegedly illegal observations constituted "only a small part." Thus, the court correctly concluded, "the warrant was clearly based on sufficient probable cause even without the evidence supplied by Braziel's illegal entry" (*ibid.*).[15]

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[14]We do not concede that the district judge properly excluded Agent Braziel's observations. Nevertheless, because the information is not necessary to the warrant's validity, this brief assumes that the ruling was correct.

[15]Hebert also complains (84-1748 Pet. 11-13) that the court below erred in failing to strike from the warrant affidavit as a fruit of Braziel's earlier illegal search the agent's observations concerning Granger's arrest. But probable cause to stop and arrest Granger existed without Braziel's observations at the residence, for the same reasons that there was probable cause to arrest petitioners Antone and Amuny (see pages 12-13, *supra*).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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